IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9329 of 2001
and
SPECIAL CIVIL APPLICATION No 7839 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DEPUTY EXECUTIVE ENGINEER
Versus
DAHYABHAI HIRABHAI

Appearance:
1. Special Civil Application No. 9329 of 2001
MR RV DESAI, AGP for Petitioner No. 1
MR KISHOR M PAUL for Respondent No. 1
2. Special Civil Application No. 7839 of 2001
MR KISHOR M PAUL for Petitioner No. 1
MR RV DESAI, AGP for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 12/12/2001

COMMON ORAL JUDGEMENT

Both these petitions challenge the judgment and award dated 30.12.2000 passed by the Labour Court, Rajkot in Reference (LCR) No. 220 of 1989. By the impugned award, the Labour Court has directed the Deputy Executive Engineer, Quality Control Sub Division, Rajkot to reinstate Shri Dahyabhai Hirabhai (hereinafter referred to as `the workman') to the original post with continuity of service and with 25% backwages. Special Civil Application No. 7839 of 2001 is filed by the workman challenging denial of balance 75% backwages. Special Civil Application No. 9329 of 2001 is filed by the employer for challenging the award for reinstatement and 25% backwages.

2. With the consent of the learned counsel for the parties, both the petitions have been heard together and are being disposed of by this common judgment.

3. The workman was employed as a daily wager watchman from 19.10.1984. The workman was employed as such till 29.8.1987 intermittently. There is a controversy whether the workman's services were terminated, as contended by the workman, on 29.8.1987 or whether the workman himself voluntarily abandoned service as contended by the employer. In any view of the matter, since the Labour Court has given a finding that the workman had not abandoned his employment, but the employer had terminated his services, the Court proceeds on the footing that the workman's services were terminated on 29.8.1987. The Labour Court has found that the termination was illegal because apart from non-payment of notice pay or retrenchment compensation under Section 25F of the Industrial Disputes Act, 1947, the employer had continued in employment the persons junior to the workman and had also recruited fresh employees after termination of the workman's services. The witness for the employer admitted that one Hari Bhaga was employed as a chowkidar vice the workman and that Hari Bhaga was employed as a permanent workman and that he was still working on the date of deposition before the Labour Court. The witness for the employer also admitted that after termination of the workman's services, one Puja Mohan was employed. Thus, the finding given by the Labour Court that the termination was illegal as persons juniors to the workman were retained or fresh recruitment was made after termination of the workman's services without giving the workman an opportunity of getting re-employment cannot be said to be illegal or without jurisdiction.

4. It is true that in his deposition, the witness

for the employer had stated that the laboratory where the workman was employed was closed down on 31.3.1994. The reasoning given by the Labour Court that such a contention was not raised in the written statement of the employer does not appear to be valid since the written statement was filed some time in the year 1990 and the laboratory came to be closed down in the year 1994; obviously such closure could not have been referred to in the written statement. That fact was, therefore, required to be taken into account. Still, however, that aspect would not be decisive because the witness admitted that similar other laboratories were started in the area under his jurisdiction and persons junior to the workman - those who are recruited after the termination of the workman's service - were being employed at such places within the jurisdiction of the employer i.e. Deputy Executive Engineer, Quality Control Sub Division, Rajkot.

5. In view of the above, no fault can be found with the direction given by the Labour Court in reinstating the workman in service on his original post.

6. As far as the question of backwages is concerned, the Labour Court granted 25% backwages. Mr Paul for the workman submits that there was no reason for denying 75% backwages and strong reliance is placed on the decision of this Court in Veterinary Officer vs. Rajendrasinh R. Jhala, 1998(1) GLR 110 in support of his contention that the grant of backwages is a rule, denial is exception and that for invoking exception, conditions for such exception must be shown to exist by the employer and that it is for the employer to show that the worker was gainfully employed during that period which was something more than mere necessity to preserve oneself.

7. On the other hand, Mr RV Desai, learned AGP for the employer has submitted that the workman had admitted in his deposition that his younger brother was carrying on agricultural operations and that it is not possible to believe the workman's case that he was not doing anything and that he was not making any contributions to those agricultural operations, particularly when he had six family members to maintain including three sons and two daughters as stated in the deposition.

8. Having heard the learned counsel for the parties, it appears to the Court that when the workman admitted that his younger brother was carrying on agricultural operations, it is reasonable to assume that during the period of unemployment in govt. service, the workman would take up some gainful employment especially when

such employment is possible in a family business or agricultural operations being carried on by a family member in a rural area. In the overall facts and circumstances of the case and also having regard to the fact that the case of the employer that the workman had abandoned employment was not believed by the Labour Court and the said finding is not disturbed by this Court on account of the limited scope of jurisdiction under Articles 226 and 227 of the Constitution, looking to the fact that the workman's juniors were continued, the possibility cannot be ruled out that the workman had not made himself available for employment when his juniors were offered employment. In this set of circumstances and in the facts and circumstances of the case, the interests of justice would be served if the direction for reinstatement with continuity of service given by the Labour Court is not disturbed, but the direction for payment of 25% backwages is set aside.

9. In view of the above discussion, Special Civil Application No. 9329 of 2001 is partly allowed. The direction given by the Labour Court for backwages is quashed and set aside, but the direction given by the Labour Court for reinstatement of the workman with continuity of service is not disturbed. It is directed that the workman shall be reinstated with continuity of service within one month from the date of receipt of the writ of this Court or a certified copy of this judgment, whichever is earlier. Rule is made absolute to the aforesaid extent with no order as to costs.

10. Special Civil Application No. 7839 of 2001 filed by the workman is dismissed. Rule is discharged with no order as to costs.

(M.S. Shah, J.)
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